

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

PERFECT 10, INC.,

Plaintiff,

v.

GIGANEWS, INC., et al.,

Defendants.

CV 11-7098 ABC (SHx)

ORDER **DENYING** PLAINTIFF'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT

Pending before the Court is Plaintiff Perfect 10, Inc.'s ("Plaintiff") Motion for Partial Summary Judgment Re: (i) DMCA Compliance of Samples Notices; and (ii) Ineligibility of Defendants for DMCA Safe Harbor Defense ("Motion," docket no. 142), filed on November 4, 2013. Defendants Giganews, Inc. ("Giganews") and Livewire Services, Inc. ("Livewire") (together, "Defendants") filed an Opposition and Plaintiff filed a Reply. Plaintiff and Defendants also filed additional materials. See docket nos. 159-161, 165, 175. The Court finds the Motion appropriate for resolution without oral argument and therefore **VACATES** the hearing set for February 24, 2014.

1 See Fed. R. Civ. P. 78, Local Rule 7-15. For the following reasons,
2 the Court **DENIES** the Motion in its entirety.

3
4 **I. BACKGROUND**

5 This Order assumes familiarity with the prior Orders issued in
6 this case, in particular with the Order granting in part and denying
7 in part Defendants' Motion to Dismiss Complaint. See March 8, 2013
8 Order (J. Matz) (docket no. 97) ("March 8 Order").

9 In summary, Plaintiff owns the copyrights to thousands of adult
10 images and several trademarks derivative of its name. Giganews is a
11 Usenet service provider. The Usenet is a global network of servers
12 that host online bulletin boards or newsgroups to which users can post
13 "messages." As a service provider, Giganews operates servers that
14 store this user-generated content. Livewire claims it does not store
15 infringing materials, but instead resells access to Giganews's
16 servers. Yokubaitis Decl. ¶¶ 12-16. Plaintiff alleges that Usenet
17 users have posted messages containing thousands of Plaintiff's
18 copyrighted images, and, broadly speaking, Plaintiff seeks to hold
19 Defendants liable for hosting those images on their servers and/or
20 providing access to those images.

21 Following motions to dismiss, the claims remaining in the case
22 are: for direct, contributory, and vicarious copyright infringement
23 against Giganews; and for direct copyright infringement against
24 Livewire. Plaintiff now seeks summary adjudication of issues relating
25 to Defendants' affirmative defenses, in particular, relating to
26 Defendants' assertions that they are eligible for certain safe harbors
27 established by the Digital Millenium Copyright Act ("DMCA"), 17 U.S.C.
28 § 512. A party that satisfies the conditions of the safe harbor

1 provisions is protected from liability for copyright infringement.

2 Although Plaintiff has not organized its Motion in the most
3 logical way and fails to distinguish between Giganews and Livewire,
4 Defendants have helpfully parsed the Motion, and summarize it as
5 seeking adjudication of the following issues as to Giganews: (1)
6 whether five notices Plaintiff sent to Giganews meet the requirements
7 of 17 U.S.C. § 512(c)(3)(A); (2) whether Giganews has reasonably
8 implemented a repeat infringer termination policy as required by §
9 512(i); and (3) whether Giganews is eligible for the safe harbor
10 protections of §§ 512(a)-(d). As to Livewire, Plaintiff appears to
11 make only one argument: that Livewire "purchases infringing materials
12 from Giganews and resells those infringing materials to third
13 parties," conduct that Plaintiff claims excludes Livewire from any
14 safe harbor. See Motion at 24:3-8.

15 Giganews argues that Plaintiff's five sample notices do not
16 comply with 17 U.S.C. § 512(c)(3)(A); that it has reasonably
17 implemented a repeat infringer termination policy; and that it is
18 eligible for safe harbor protection under §§ 512(a), (c), and (d).
19 Livewire also contends that it is eligible for safe harbor protection
20 under §§ 512(a), (c), and (d).

21 22 II. LEGAL STANDARD

23 "The court shall grant summary judgment if the movant shows that
24 there is no genuine dispute as to any material fact and the movant is
25 entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The
26 moving party has the burden of demonstrating the absence of a genuine
27 issue of fact for trial. Anderson v. Liberty Lobby, Inc., 477 U.S.
28 242, 256 (1986).

1 Once the moving party satisfies its initial burden, the adverse
2 party must set forth specific facts showing that there is a genuine
3 issue for trial. S. Cal. Gas Co., 336 F.3d at 888 ("[The non-moving
4 party] can defeat summary judgment by demonstrating the evidence,
5 taken as a whole, could lead a rational trier of fact to find in its
6 favor.") (citations omitted).

7 Both the moving party and the adverse party must support their
8 factual positions by "citing to particular parts of materials in the
9 record . . . or . . . showing that the materials cited do not
10 establish the absence or presence of a genuine dispute, or that an
11 adverse party cannot produce admissible evidence to support the fact."
12 Fed. R. Civ. P. 56(c)(1)(A), (B).

13 An issue of fact is genuine if it reasonably can be resolved in
14 favor of either party. Anderson, 477 U.S. at 250-51. "[A] district
15 court is not entitled to weigh the evidence and resolve disputed
16 underlying factual issues." Chevron Corp. v. Pennzoil Co., 974 F.2d
17 1156, 1161 (9th Cir. 1992). Rather, "the inferences to be drawn from
18 the underlying facts . . . must be viewed in the light most favorable
19 to the party opposing the motion." United States v. Diebold, Inc.,
20 369 U.S. 654, 655 (1962). However, the court must view the evidence
21 presented "through the prism of the substantive evidentiary burden."
22 S. Cal. Gas Co., 336 F.3d at 254. Yet "mere disagreement or the bald
23 assertion that a genuine issue of material fact exists" does not
24 preclude summary judgment. Harper v. Wallingford, 877 F.2d 728, 731
25 (9th Cir. 1989). The "existence of some alleged factual dispute
26 between the parties will not defeat an otherwise properly supported
27 summary judgment motion; the requirement is that there be no genuine
28 issue of material fact." Anderson, 477 U.S. at 247-48. The "opponent

1 must do more than simply show there is some metaphysical doubt as to
2 the material facts." Matsushita Elec. Indus. Co., Ltd. v. Zenith
3 Radio Corp., 475 U.S. 574, 586 (1986).

4 5 **III. ANALYSIS**

6 **A. Preliminary Evidentiary Issues**

7 The Court has reviewed the parties' voluminous evidentiary
8 objections. Plaintiff's objections to the Declarations of Ronald
9 Yokubaitis (docket no. 149-6) and Philip Molter (docket no. 149-11)
10 are substantially meritless. By contrast, Defendants do raise serious
11 questions about whether the Declarations of Norman Zada (docket nos.
12 142-3, 150-1) are admissible. Of particular concern is whether some
13 of Zada's statements are tantamount to expert testimony that Zada is
14 not qualified to give. However, the Court will not rule on these
15 objections because even if Zada's testimony is admitted, Plaintiff's
16 Motion still fails.

17 The Court overrules Plaintiff's objections to the Declarations of
18 William Rosenblatt (docket no. 149-2) and John Levine (docket no. 149-
19 4). Plaintiff argues that Defendants failed to disclose Rosenblatt
20 and Levine in their Rule 26 initial disclosures and therefore should
21 not be permitted to rely on their declarations to oppose the Motion.
22 However, Rosenblatt and Levine are offered as experts, and as such
23 Defendants were not required to disclose them in their Rule 26 initial
24 disclosures. Rather, the deadline for disclosing experts is June 2,
25 2014. See Scheduling Order (docket no. 139). As such, Defendants
26 have not run afoul of the deadline for disclosing Rosenblatt and
27 Levine. The Court also overrules Plaintiff's objection that the
28 Yokubaitis Declaration should not be considered because Defendants did

1 not produce him for deposition. It appears that Yokubaitis was ill
2 and the parties were working to find a convenient deposition date when
3 Plaintiff decided to file its Motion. Notably, Plaintiff filed the
4 Motion very early, as the discovery cut-off date is June 30, 2014.
5 Id. In the meantime, Yokubaitis was able to provide a declaration to
6 support Defendants' Opposition. Nothing about this suggests
7 Defendants failed to honor discovery obligations.

8 Plaintiff's position in the event the Court denies its objections
9 is that the Court should continue the Motion to allow it to conduct
10 discovery on Rosenblatt, Levine, and/or Yokubaitis, and then file
11 supplemental briefing. See Reply at 5, fn.1. As noted, and as
12 Plaintiff should have known, this Motion is very premature. If
13 Plaintiff decided in retrospect that filing the Motion so early was a
14 mistake, then it should have withdrawn it. The interests of judicial
15 economy are ill-served when the Court makes piecemeal evidentiary
16 rulings and allows the parties to submit supplemental briefing that
17 the Court then has to reconcile with the existing flawed papers, all
18 to allow a party to attempt to salvage a Motion that it chose to file
19 months before the discovery cut-off. The Court therefore declines to
20 stay the Motion on the terms Plaintiff proposes and will instead rule
21 on it.

22 **B. The Digital Millenium Copyright Act's Legal Framework**

23 The DMCA establishes safe harbors that protect service providers
24 from liability for (1) transitory digital network communications; (2)
25 system caching; (3) information residing on systems or networks at the
26 direction of users; and (4) information location tools. 17 U.S.C. §§
27 512(a)-(d) (footnotes omitted). A service provider must satisfy
28 certain conditions to be eligible for any particular safe harbor. To

1 be eligible for any of the § 512 safe harbors, a service provider must
2 have "adopted and reasonably implemented" a policy that provides for
3 the termination of repeat infringers. 17 U.S.C. § 512(i).

4 At issue here is whether either Defendant is eligible for safe
5 harbor under § 512(c), and whether Giganews has adopted and reasonably
6 implemented a repeat infringer termination policy under § 512(i).

7 **C. Plaintiff Has Not Shown that Giganews' Repeat Infringer**
8 **Termination Policy Falls Short of § 512(i).**

9 To be eligible for any of the four safe harbors stated in §
10 512(a)-(d), a service provider must first meet the threshold
11 conditions set out in § 512(i), including the requirement that it:

12 has adopted and reasonably implemented, and informs
13 subscribers and account holders of the service
14 provider's system or network of, a policy that
15 provides for the termination in appropriate
16 circumstances of subscribers and account holders of
17 the service provider's system or network who are
18 repeat infringers.

19 17 U.S.C. § 512(i)(1)(A).

20 The statute does not define "reasonably implemented." However,
21 the Ninth Circuit treats this concepts as consisting of two
22 components: first, whether a service provider implements a policy, and
23 second, whether that implementation is reasonable. See Perfect 10,
24 Inc. v. CCBill LLC, 488 F.3d 1102, 1109-10 (9th Cir. 2007) (" CCBill
25 LLC"). Under this rubric, a service provider "implements" a policy if
26 "it has a working notification system, a procedure for dealing with
27 DMCA-compliant notifications, and [] does not actively prevent
28 copyright owners from collecting information needed to issue such

1 notifications." CCBill LLC, 488 F.3d at 1109. Second, that
2 implementation is "reasonable" if, under "'appropriate circumstances,'
3 the service provider terminates users who repeatedly or blatantly
4 infringe copyright." Id.

5 Plaintiff's opening brief does not dispute that Giganews has a
6 working notification system, a procedure for dealing with DMCA-
7 compliant notifications, and that it does not actively prevent
8 copyright owners from collecting information needed to issue such
9 notices. Despite its opening brief's silence on these issues,
10 Plaintiff's Reply appears to assert that the policy is inadequate. As
11 such, the Court will briefly address whether Giganews's policy, on its
12 face, satisfies the first component set forth in CCBill.

13 The parties refer to Giganews's policy as a "two-strike" policy:
14 upon learning that a user has posted an infringing message, Giganews
15 freezes the user's account and provides the user with a warning that
16 another infringement will result in the termination of the account.
17 If the user responds that he/she will not post any additional
18 infringing material, the account is "unfrozen." If Giganews is
19 informed that the user has posted any additional infringing material,
20 that user's account is terminated. See, e.g., Molter Decl. ¶¶ 27-35
21 (describing Giganews's repeat infringer termination policy). There is
22 no serious dispute that Giganews has a system in place to receive and
23 deal with DMCA-compliant notifications, and Plaintiff has not
24 suggested that Giganews prevents copyright owners from collecting data
25 they need to send such notices. Having reviewed Giganews's policy,
26 the evidence explaining it, and the relevant law, Plaintiff has not
27 shown that Giganews's policy is inadequate such that Giganews does not
28 "implement" a policy. Thus, the Motion is denied insofar as it argues

1 Giganews's policy is inadequate.

2 The gravamen of Plaintiff's challenge is to the "reasonableness"
3 of Giganews's implementation of its policy, that is, whether Giganews
4 actually terminates users as its policy states. Again, Plaintiff has
5 not carried its burden on this issue. The Court will address each
6 subissue briefly in turn.

7 Plaintiff argues that Giganews has not terminated all of the
8 repeat infringers who posted messages it identified by Message-ID in
9 its DMCA notices. Having reviewed all of the evidence, the Court
10 finds that it precludes summary adjudication of this issue in
11 Plaintiff's favor.

12 Plaintiff also argues that Giganews must remove all of a repeat
13 infringer's content, not just the content a copyright holder has
14 specifically identified as infringing. Giganews acknowledges that it
15 removes only the specifically-identified infringing messages posted by
16 a repeat infringer, and not all of the messages ever posted by a
17 repeat infringer. The Court is not persuaded that § 512(i)(1)(A)
18 requires a service provider to disable or delete all messages a repeat
19 infringer has ever posted. By its terms, the section requires
20 "termination . . . of subscribers and account holders," not the
21 deletion of messages. In addition, by Plaintiff's reading, §
22 512(i)(1)(A) would require a service provider to take down all of a
23 user's messages, not just the infringing ones. Because deleting non-
24 infringing messages does not serve any infringement-preventing
25 purpose, there is no justification for reading such a requirement into
26 the statute. In short, the Court will not read into the statute a
27 requirement that its plain language does not support and that goes far
28 beyond stopping and deterring copyright infringement.

1 Plaintiff argues that the fact that Giganews has terminated only
2 46 repeat infringers since 2008 despite removing more than 531 million
3 infringing messages over the past year, see Molter Decl. ¶¶ 22, 28,
4 demonstrates that Giganews does not properly implement its policy.
5 The conclusion that Plaintiff urges is an inference that *may* be drawn
6 from the bare facts its cites, but that conclusion is *not compelled* by
7 the evidence. As such, the Court cannot summarily adjudicate this
8 issue.

9 Plaintiff argues that the fact that Giganews does not know the
10 identity of all users whose messages reside on its servers
11 demonstrates that Giganews's policy is inadequate, because if Giganews
12 cannot identify a user, it cannot "reasonably implement" a repeat
13 infringer termination policy. However, that a Usenet service provider
14 cannot identify all users whose messages reside on its servers appears
15 to be a function of how the entire Usenet works. According to
16 Giganews, all Usenet service providers encrypt the data that
17 identifies the user who posted a message; this encrypted data is
18 reflected in a part of the message header called the X-trace field.
19 Only the Usenet service provider with whom an account is registered
20 can decrypt the X-trace field it has attached to a message posted by
21 that user. Many of the messages hosted on Giganews servers are posted
22 through accounts registered with other Usenet providers. Because
23 Giganews cannot decrypt the X-trace field on such messages, it cannot
24 link such messages to any specific users, and thus cannot apply its
25 repeat infringer termination policy to such users. See, e.g., Molter
26 Decl. ¶¶ 18, 29-31; Rosenblatt Decl. ¶¶ 66-72. The foregoing evidence
27 precludes summary adjudication of whether Giganews "reasonably
28 implements" its repeat infringer termination policy.

1 This evidence also raises an issue neither party addressed. The
2 Court questions whether Giganews *could* "terminate" repeat infringers
3 who are registered with a different provider because, by definition,
4 those users's accounts reside with a different provider. If Giganews
5 can not terminate accounts registered with other Usenet providers,
6 then Giganews would not be able to apply its repeat infringer policy
7 to such accounts even if it could identify them as repeat infringers.
8 At a minimum, in light of this unresolved threshold issue, the Court
9 cannot find that Giganews's repeat infringer termination policy is
10 inherently infirm merely because Giganews cannot identify accounts
11 through which infringing messages are posted when such accounts are
12 registered with a different provider.

13 For the foregoing reasons, the Court **DENIES** Plaintiff's Motion
14 insofar as it seeks a determination that Giganews's repeat infringer
15 termination policy does not comply with § 512(i)(1)(A)

16 **D. Plaintiff Has Not Established that its Notices Comply with**
17 **§ 512(c)(3)(A).**

18 To claim the protection of § 512(c) for storing material on
19 systems or networks at the direction of users, a service provider
20 must, "upon notification of claimed infringement as described in
21 paragraph (3), respond[] expeditiously to remove, or disable access
22 to, the material that is claimed to be infringing or to be the subject
23 of infringing activity." 17 U.S.C.A. § 512(c). A service provider's
24 obligation to remove infringing material is not triggered unless the
25 copyright holder provides a notice that complies with § 512(c)(3)(A).
26 Section 512(c)(3)(A) states:

27 (A) To be effective under this subsection, a
28 notification of claimed infringement must be a

1 written communication provided to the
2 designated agent of a service provider that
3 includes substantially the following:

4 (i) A physical or electronic signature of a
5 person authorized to act on behalf of the
6 owner of an exclusive right that is
7 allegedly infringed.

8 (ii) Identification of the copyrighted work
9 claimed to have been infringed, or, if
10 multiple copyrighted works at a single
11 online site are covered by a single
12 notification, a representative list of
13 such works at that site.

14 (iii) Identification of the material that is
15 claimed to be infringing or to be the
16 subject of infringing activity and that
17 is to be removed or access to which is to
18 be disabled, and information reasonably
19 sufficient to permit the service provider
20 to locate the material.

21 (iv) Information reasonably sufficient to
22 permit the service provider to contact
23 the complaining party, such as an
24 address, telephone number, and, if
25 available, an electronic mail address at
26 which the complaining party may be
27 contacted.

28 (v) A statement that the complaining party

1 has a good faith belief that use of the
2 material in the manner complained of is
3 not authorized by the copyright owner,
4 its agent, or the law.

5 (vi) A statement that the information in the
6 notification is accurate, and under
7 penalty of perjury, that the complaining
8 party is authorized to act on behalf of
9 the owner of an exclusive right that is
10 allegedly infringed.

11 17 U.S.C. § 512(c)(3).

12 Plaintiff seeks a ruling that five of the Notices it sent to
13 Giganews comply with § 512(c)(3)(A). See Notices (Zada Decl. Exhs. 9-
14 13).¹

15 The parties' disagreement focuses on one element, §
16 512(c)(3)(A)(iii), which has two components: identification of the
17 infringing material, and information reasonably sufficient to permit
18 the service provider to locate the material.

19 At this point, a description of Plaintiff's Notices is in order.
20 Plaintiff's Notices instruct Giganews to use certain newsreaders to
21 conduct searches of specific names within certain newsgroups, and then
22 tell Giganews that all of the messages yielded by those searches on a
23 certain date contained infringing material. Along with (verbose)
24 written instructions for performing these searches, Plaintiff's

25
26 ¹ Plaintiff sent more than these five notices to Giganews.
27 However, Plaintiff appears to believe that these notices are
28 representative of the body of notices it sent to Giganews, such that
any adjudication of this issue with respect to any of the five notices
will apply to other notices at issue in the case.

1 Notices include pages of thumbnail images of the infringing materials
2 and/or screen shots of the newsreader interface reflecting the search
3 results. Plaintiff contends that this satisfies § 512(c)(3)(A)(iii)
4 because the search results and thumbnails both "identify" the
5 infringing messages and also provide sufficient information to permit
6 Giganews to "locate" those messages.

7 Giganews contends that these Notices are inadequate insofar as
8 they fail to include Message-IDs for each infringing message.
9 According to Giganews, a Message-ID is a string of letters and
10 numbers; every Usenet message is assigned a unique Message-ID that any
11 Usenet user can view on a message's message header. Giganews contends
12 that a Message-ID is the only unique identifier associated with any
13 message, and is therefore the only way it can "locate," and,
14 accordingly, disable, infringing messages. See, e.g., Rosenblatt
15 Decl. ¶¶ 29-39. Indeed, insofar as Plaintiff's Notices included
16 Message-IDs for infringing messages, Giganews disabled those
17 messages.² Yokubaitis Decl. ¶ 30. Thus, the controversy is whether
18 Plaintiff's Notices lacking Message-IDs satisfy § 512(c)(3)(A)(iii).

19 Stated in terms of the statute, the issue is whether, as
20 Plaintiff contends, its search instructions and the attached thumbnail
21 images and screen shots "identif[y]" the infringing material and
22 constitute "information reasonably sufficient to permit the service
23 provider to locate the material." 17 U.S.C. § 512(c)(3)(A)(iii).

24 Caselaw explains that the "DMCA notification procedures place the
25 burden of policing copyright infringement - identifying the

26
27
28 ² Plaintiff's Notices indicated a Message-ID (seemingly
inadvertently) for only a small minority of the infringing messages.

1 potentially infringing material and adequately documenting
2 infringement - squarely on the owners of the copyright." CCBill, 448
3 F.3d at 1113. "The goal of [Subsection (c)(3)(A)(iii)] is to provide
4 the service provider with adequate information to find and address the
5 allegedly infringing material *expeditiously*." Viacom Intern Inc. v.
6 YouTube, Inc., 940 F. Supp. 2d 110, 115 (S.D.N.Y. 2013) (emphasis
7 added). Congress cited as "an example of such sufficient information"
8 "a copy or description of the allegedly infringing material and the
9 URL address of the location (web page) which is alleged to contain the
10 infringing material." Id.

11 The Court has reviewed the cases and all of the evidence bearing
12 on this issue and finds that Plaintiff has not met its burden of
13 showing that, as a matter of law, its Notices comply with §
14 512(c)(3)(A)(iii).

15 As to the identification component of § 512(c)(3)(A)(iii), it is
16 not clear that Plaintiff's approach of pointing to the results of a
17 search performed on a specific date at a specific time on a specific
18 newsreader, and attaching thumbnail images and screen shots, amounts
19 to "identification of the infringing material. . ." First, this
20 method points to a list of search results, not to any material in
21 particular. Second, it is judicially noticeable that the material
22 accessible through the Usenet is in a constant state of flux. As
23 such, there is no certainty that any particular search will yield the
24 exact same results at different times. Searches moments apart could
25 yield different results. Plaintiff argues that the searches it
26 specified in fact yielded the same results when performed months
27 apart. See Reply at 6:4-11. However, even accepting the assertion
28 that searches performed at different times yielded the same results,

1 verifying this requires a Usenet provider to compare its search
2 results to Plaintiff's search results in an onerous side-by-side,
3 line-by-line manner. See Zada Reply Decl. ¶ 7 (3:20-4:1) (describing
4 his process for comparing search results). Furthermore, a close
5 reading of the Zada Reply Declaration reveals that, for at least one
6 of the Notices, the search Plaintiff instructed Giganews to perform
7 yielded some messages that were non-infringing. See Zada Reply Decl.
8 ¶ 7 (3:13-20). As such, Plaintiff's "identification" method enlists
9 Giganews to compare its search results to Plaintiff's search results
10 to see if they are the same, and to distinguish between material that
11 infringes Plaintiff's copyrights and material that doesn't. The more
12 Giganews must sort through these search results to determine what the
13 infringing material is, the less it seems that Plaintiff has provided
14 Giganews with "identification of" the infringing material. In light
15 of all of the foregoing, this issue cannot be resolved summarily in
16 Plaintiff's favor.

17 As to whether Plaintiff's Notices provide "information reasonably
18 sufficient to permit the service provider to locate the material,"
19 again, Plaintiff has not met its burden. This provision, by its
20 terms, is slippery: it requires the copyright holder to provide
21 "information reasonably sufficient . . ." Every first year law
22 student learns that the term "reasonably" is amorphous, but it almost
23 always involves the weighing of alternatives, burdens, and costs. As
24 noted above, the burden of "identifying the potentially infringing
25 material and adequately documenting infringement [falls] squarely on
26 the owners of the copyright." CCBill, 448 F.3d at 1113. Furthermore,
27 the notification should enable the service provider to remove the
28 offending material *expeditiously*. See YouTube, 940 F. Supp. 2d at

1 115. "[A] copy or description of the allegedly infringing material
2 and the URL address of the location (web page) which is alleged to
3 contain the infringing material" is an example of sufficient
4 information. Id. (emphasis added).

5 Giganews analogizes a Usenet message's Message-ID to a webpage's
6 URL, as, like a URL, the Message-ID is the only unique identifier that
7 a Usenet service provider can use to locate a Usenet message. Indeed,
8 according to Giganews, the Message-ID is the data Giganews enters into
9 its disabling program to disable a message. See Molter Decl. ¶ 20.
10 In an attempt to downplay the singular utility of a Message-ID for
11 identifying and locating a message, Plaintiff points to several other
12 variables in message headers that could be used *in combination* to
13 "locate" a message. But, a Message-ID suffices to locate a message,
14 and adding more variables to the location process does not solve any
15 problem, it only complicates them. In short, Plaintiff's Rube
16 Goldberg method of locating messages doesn't aid Plaintiff, because
17 that method would just compound the problems noted below for both
18 sides.

19 Based on Giganews's evidence, the searches Plaintiff instructed
20 it to perform appear to be analogous to a web search using a search
21 engine, such as the kind of search one would perform using Google.
22 Such searches yield a list of results that may or may not include the
23 content the user wants to find. See, e.g., Rosenblatt Decl. ¶¶ 25-28,
24 Levine Decl. ¶¶ 32-39. Giganews has presented evidence that such
25 searches simply do not function effectively within Usenet's
26 architecture. See Rosenblatt Decl. ¶¶ 29-39, Levine Decl. ¶¶ 34-39.
27 The Court also notes that while a web search may "find" a number of
28 results, the search itself does not actually locate the items found;

1 the search engine just presents its search results in a list, and any
2 item in that list is not "located" until its URL is extracted.

3 Similarly, Giganews argues that in order to "locate" a message
4 that appears in one of Plaintiff's searches, one must extract the
5 Message-ID from that message's message header. See Rosenblatt Decl.
6 ¶¶ 29-39. Both sides describe several ways to extract the Message-ID.
7 The most onerous approach is a manual, message-by-message process
8 requiring a person to download each message, open each message's
9 message header, and extract the Message-ID by cutting-and-pasting the
10 Message-ID from the message header into another document or program.
11 A more efficient approach involves using a computer program to extract
12 Message-IDs automatically from a number of pre-selected messages,
13 without the need for a person to undertake the above-described manual
14 cut-and-paste steps for each message individually. There is evidence
15 that both Plaintiff and Giganews can perform these manual Message-ID
16 extractions, and both could also easily write computer programs to
17 execute such extractions. Giganews also points out that many holders
18 of large portfolios of copyrighted material enlist the service of
19 third-party companies who prepare DMCA notices with Message-IDs.

20 Thus, the crux of the parties' dispute is who must bear the
21 burden of extracting the Message-IDs associated with the infringing
22 messages, copyright holders or Usenet service providers. According to
23 Giganews, if it had to extract Message-IDs for the hundreds of
24 millions of messages identified in DMCA notices it has received, it
25 would not be able to function. See Opp'n 5:24-26; 21:21-25. All of
26 the declarations Giganews submitted substantiate this claim. That
27 Plaintiff also expects Giganews to run searches and compare its search
28 results to Plaintiff's search results to isolate infringing messages

1 makes this burden even greater. Giganews also points out that because
2 Plaintiff already knows which messages are infringing, it would be
3 much easier for Plaintiff to extract the Message-IDs, whether by a
4 manual cut-and-paste method, by using a computer program, or by using
5 a third-party service. For its part, Plaintiff notes that Giganews
6 did extract Message-IDs for infringing messages reflected in Notices 1
7 and 2, and argues that this demonstrates that all Notices lacking
8 Message-IDs were sufficient to allow Giganews to locate the messages.

9 Based on the foregoing, triable issues preclude summary
10 adjudication of this issue in Plaintiff's favor. Giganews has
11 presented substantial evidence of the untenable burden it would face
12 if every DMCA notice it received required it to undertake the Message-
13 ID extraction process Plaintiff expects of it. That Giganews
14 evidently chose to undertake this process for two of Plaintiff's
15 Notices does not necessarily mean that those Notices satisfy §
16 512(c)(3)(A); it may mean that Giganews went beyond its duty.

17 In short, Plaintiff has not met its burden to show that its
18 Notices comply with 17 U.S.C. § 512(c)(3)(A)(iii). This aspect of the
19 Motion is therefore **DENIED**.

20 **E. Plaintiff Has Not Shown that the Defendants Are Ineligible for**
21 **Safe Harbor Protection Under § 512(c).**

22 Plaintiff contends that Defendants are not eligible for any of
23 the four safe harbors set forth in §§ 512(a)-(d), but really only
24 addresses § 512(c) in relation to Giganews. Plaintiff devotes only
25 one page and six lines of its opening brief to this argument. See
26 Mot. 23:21-24:26. Plaintiff's argument as to Livewire is somewhat
27 hard to discern and is stated entirely as follows: that Livewire
28 "purchases infringing materials from Giganews and resells those

1 infringing materials to third parties," conduct that Plaintiff claims
2 excludes Livewire from any safe harbor. See Motion at 24:3-8. In
3 response, both Defendants contend that they are eligible for
4 protection under §§ 512(a), (c), and/or (d). Because Plaintiff did
5 not specifically address §§ 512(a) or (d), those safe harbors are not
6 in issue so the Court will not reach them. The Court will therefore
7 only reach Defendants' eligibility for § 512(c).

8 Section 512(c) provides immunity "for infringement of copyright
9 by reason of the storage at the direction of a user of material that
10 resides on a system or network controlled or operated by or for the
11 service provider." Thus, a provider may be immune if it stores
12 infringing material at the direction of a user. Plaintiff contends
13 that Giganews is not eligible for this safe harbor because it copies
14 infringing messages to its servers without the intervention of third-
15 party users, and because it stores these images on its servers for as
16 long it wants to. However, according to Giganews, that messages are
17 copied to Usenet servers in this way is simply a function of the
18 Usenet, which provides for the *continuous and automatic propagation or*
19 *copying* of messages across all Usenet servers. See Rosenblatt Decl. ¶
20 29. Because these messages are propagated automatically once they are
21 posted by the third-party user, that propagation itself is arguably
22 "at the direction of" a user. Insofar as Plaintiff's arguments as to
23 Livewire turns on its statement that Livewire "purchases infringing
24 materials from Giganews and resells those infringing materials to
25 third parties," that is a disputed issue of fact. As such, whether
26 Defendants are eligible for protection under § 512(c) cannot be
27 summarily adjudicated in Plaintiff's favor, so this aspect of the
28 Motion is **DENIED**.

IV. CONCLUSION

For the foregoing reasons, Plaintiff's Motion for Partial Summary Judgment is **DENIED** in its entirety.

IT IS SO ORDERED.



DATED: January 29, 2014

AUDREY B. COLLINS
UNITED STATES DISTRICT JUDGE